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In The

SUPREME COURT OF THE UNITED STATES

No. 5, Original, October Term, 1944

THE STATE OF NEBRASKA, COMPLAINANT,

V.

THE STATE OF WYOMING, DEFENDANT,

THE STATE OF COLORADO, IMPLEADED DEFENDANT,

UNITED STATES OF AMERICA, INTERVENER.

EXCEPTIONS ON BEHALF OF THE STATE OF NEBRASKA, COMPLAINANT.

WALTER R. JOHNSON,
Attorney General,
JOHN L. RIDDELL,
Assistant Attorney General,
PAUL F. GOOD,
Special Counsel,
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Attorneys for Complainant.

Comes now the State of Nebraska, complainant, and respectfully takes exception to the report of Michael J. Doherty, Special Master herein, in the following respects and for the following reasons:

1. Complainant excepts to the first four lines of the paragraph numbered 4, on page 9 of said report, for the reason that the same is contrary to the evidence, not supported by sufficient evidence, contrary to law, unjust and inequitable and does not result in a proper and equitable division of the waters of the North Platte River.

2. Complainant excepts to the paragraph numbered 5, on page 9 of said report, for the reason that the same is contrary to the evidence, not supported by sufficient evidence, contrary to law, unjust and inequitable and does not give to the State of Nebraska a fair and equitable apportionment of the waters of the North Platte River.

3. Complainant excepts to the first sentence of paragraph 6, on page 9 of said report, for the reason that the same is contrary to the evidence, not supported by sufficient evidence, contrary to law and awards to the State of Colorado an inequitably large portion of the waters of the North Platte River.

4. Complainant excepts to the first sentence of paragraph 7, on page 9 of said report, for the reason that the same is contrary to the evidence, not supported by sufficient evidence, contrary to law and awards to the State of Wyoming an inequitably large portion of the waters of the North Platte River.

5. Complainant excepts to the last sentence in paragraph numbered 9, on page 10 of said report, insofar as the same recommends a proportionate allocation between Wyoming and Nebraska of the daily natural flow for the

reason that the same is contrary to the evidence, not supported by sufficient evidence, contrary to law and cannot be equitably operated so as to give to the State of Nebraska its fair, just and equitable portion of the waters of the North Platte River.

6. Complainant excepts to the finding, lines 5 to 8, page 22 of the Master's report, and especially the figure 281,940 acre-feet on line 8 for the reason that the same is contrary to the evidence, not sustained by sufficient evidence and for the reason that therein the Master has inadvertently ignored the contribution made by Colorado to the North Platte River through the Laramie River in the amount of 184,100 acre-feet.

7. Complainant excepts to lines 9 to 11, page 22 of the Master's report, especially the figure 1,027,890 on line 11 for the reason that the same is contrary to the evidence, not sustained by sufficient evidence and is erroneous in two respects: (a) the table from which the said figure was taken (Colorado Exhibit 168) shows said figure as being the contribution from the Wyoming-Nebraska line to the City of North Platte, Nebraska, instead of Kingsley Reservoir, and (b) for the reason that the said figure includes approximately 4,000 acre-feet of water lost to use, to-wit: approximately 128,000 acre-feet retained in ground storage and 270,000 acre-feet lost in river conveyance (Colorado Exhibit 127, Sheet 3).

8. Complainant excepts to line 19, page 22 of the Master's report, and the figure of 1,336,090 acre-feet as Nebraska's contribution to the river for the reason that the same is contrary to the evidence and not sustained by sufficient evidence in that it includes the item of

approximately 400,000 acre-feet of unusable water referred to in Item 7, supra.

9. Complainant excepts to line 18, page 22 of the Master's report, and the figure of 1,731,600 acre-feet as Wyoming's contribution to the river for the reason that it is contrary to the evidence and not sustained by sufficient evidence and includes 248,800 acre-feet estimated annual loss in river conveyance and, therefore, unusable water as shown by Sheet 1 (Colorado Exhibit 127).

10. Complainant excepts to the last sentence above the footnotes, on page 29 of said report, for the reason that the same is contrary to the evidence, not sustained by sufficient evidence and does not give sufficient weight to the factors actually operating in the development of irrigation in Nebraska on the North Platte River since 1910.

11. Complainant excepts to the findings in table II on page 59; in table V on page 73; in table XII on page 78; in table XV on page 81; in table XVII on page 86; at line 28 on page 156; the tabulation in subparagraph b on page 178; lines 6 to 14 on page 243; lines 23 to 25 on page 244, and table XXIV on page 251, for the reason that the limitation as to acreage, second-foot diversion rate and total seasonal acre-foot allotment for the lands irrigated under the Tri-State Canal are contrary to the evidence, not supported by sufficient evidence, are unjustly restrictive in comparison with corresponding allotments for acreage findings for other areas, particularly in Wyoming and Colorado, and result in depriving the State of Nebraska of its just, fair and equitable apportionment of the waters of the North Platte River.

12. Complainant excepts to the finding on line 2 on page 60; on line 13 on page 61; the requirement figure in table III on page 67; the requirement figure in table IV on page 71; the requirement figure for Nebraska in table V, pages 73 to 75; the requirement figure in table XVII, pages 86 to 87; the requirement figures in the tabulation on page 152; the requirement figure in table XIX, page 154, and the requirement figure in the tabulation on page 159, for the reason that the same underestimates the total requirements of Nebraska lands and, therefore, the total requirements for the section (Whalen to Tri-State Dam) and is contrary to the evidence, not sustained by sufficient evidence, and deprives the State of Nebraska of its fair, just and equitable apportionment of the waters of the North Platte River.

13. Complainant excepts to the finding on lines 10 to 14, page 91 of said report, for the reason that the said finding as to the extent of damage to Nebraska by the acts of defendant, State of Wyoming, and intervenor, United States, is contrary to the evidence and not sustained by sufficient evidence.

14. Complainant excepts to the finding in the last seven lines above the footnotes on page 92 and to the findings, pages 254 to 257, relating to water supply for canals east of the Tri-State Dam and their elimination from an apportionment of the waters originating above the Nebraska-Wyoming state line for the reason that the same is contrary to the evidence, not sustained by sufficient evidence and is contrary to law.

15. Complainant excepts to the findings in table XVIII, page 93, and on page 258 as to the acreage and

river demand requirements of the Winters Creek Canal for the reason that the same is contrary to the evidence and not sustained by sufficient evidence.

16. Complainant excepts to the findings in table XVIII, page 93, and on page 259 as to the acreage and the water requirements of the Central Canal for the reason that the same is contrary to the evidence and not sustained by sufficient evidence.

17. Complainant excepts to the findings in table XVIII, page 93, and on pages 264 to 265 as to the acreage and river demand requirements of the Alliance Canal for the reason that the same is contrary to the evidence and not sustained by sufficient evidence.

18. Complainant excepts to the finding and conclusion, lines 8 to 12, page 96, eliminating the lands east of the State Line Canals from any demands upon waters originating above the Wyoming-Nebraska state line for the reason that the same is contrary to the evidence and not sustained by sufficient evidence and contrary to law and operates to deprive Nebraska of its fair, just and equitable apportionment of the waters in the North Platte River.

19. Complainant excepts to the findings and conclusions, lines 6 to 10, page 104, failing to apply as against both states in interstate distribution of water the same principles used by both states in their internal administration for the reason that the same is contrary to law, unjust and inequitable and contrary to previous decisions of this court.

20. Complainant excepts to the findings and conclusions in lines 14 to 29, page 105, as to proof of Nebraska's

damage for the reason that the same is contrary to the evidence, not sustained by sufficient evidence and fails to give due weight to the threat of damage from Wyoming, particularly from the Kendrick project, and fails to give due weight to the finding, on page 37, that the river has been long over-appropriated as to natural flow.

21. Complainant excepts to the findings and conclusions, lines 10 to 22, page 112; lines 1 to 17, page 113; all of page 114 and lines 23 to 30, page 115, for the reason that the under-emphasis as to priority therein contained are contrary to law, contrary to precedents in this court and operate to deprive Nebraska of its fair, just and equitable apportionment of the waters of the North Platte River.

22. Complainant excepts to the finding and conclusion in the second and third lines of page 133, and subdivision b of paragraph numbered 1, on page 177, allotting and permitting to the State of Colorado the annual storage of 17,000 acre-feet of water in the reservoirs in the North Platte basin in Colorado for the reason that said allotment of storage is in excess of the present storage capacity of reservoirs in Colorado and said basin, is contrary to the evidence, is not sustained by sufficient evidence and would operate to permit the State of Colorado to increase the capacity of storage facilities in Colorado to the damage of Nebraska, and thus take control of and use an excessive amount of water in excess of the equitable share of the State of Colorado and depriving Nebraska of its equitable share of said waters.

23. Complainant excepts to lines 9 to the end of page 149 and the findings and conclusions contained therein for the reason that the same are contrary to the evidence, contrary to law and operate to deprive Nebraska of its fair, just and equitable allotment to the waters of the North Platte River.

24. Complainant excepts to line 16 to the end of page 150 and the findings and conclusions therein contained for the reason that the distribution therein proposed is not a fair, just and equitable apportionment of the waters of the North Platte River, and for the reason that the said findings and conclusions are contrary to law, contrary to the evidence and not sustained by sufficient evidence.

25. Complainant excepts to the findings and conclusions, lines 17 to 25, page 156, for the reason that the same is contrary to the evidence, not sustained by sufficient evidence, contrary to law, and does not require the imposition of the same rule of distribution interstate as is applied by the respective states in intrastate administration.

26. Complainant excepts to the findings and conclusions contained in the last six lines of page 156 and the first twenty lines of page 157 for the reason that the same constitutes and contains an improper analysis of the relationship between the respective State Line Canals, is contrary to the evidence and not sustained by sufficient evidence, is contrary to law and operates to deprive Nebraska of its fair, just and equitable apportionment of the waters of the North Platte River.

27. Complainant excepts to the findings and conclusions commencing with the last four lines on page 158 and ending with line 12 on page 162 for the reason that the same is contrary to the evidence, not sustained by sufficient evidence, contrary to law and constitutes an unjust and inequitable apportionment of the waters of the North Platte River and operates to deprive Nebraska of its fair, just and equitable apportionment of said waters.

28. Complainant further excepts to the same portion of the said report as referred to in the immediately preceding exception for the reason that a more equitable division of the waters referred to in said portion of said report would be by the block or group method described in the table at the bottom of page 159 with further subdivisions of flows up to 1526 second-feet for the reason that said block or group method of distribution would be more just and equitable and more nearly approximate the relative rights of the respective states and their appropriators to the waters available in the section of the river therein treated.

29. Complainant excepts to paragraphs numbered 3 and 4, on pages 177 and 178, insofar as said paragraphs fail to afford protection to the Nebraska lands under the Interstate, Fort Laramie and Northport Canals against out of priority diversion and storage in the Kendrick Project for the reason that the previous findings contained in said report require such protection, and that it is contrary to law and unjust and inequitable to fail to afford such protection to said lands.

30. Complainant excepts to paragraphs numbered 3 (a) and 3 (b), pages 177 to 178, for the reason that, as

against the United States and projects and lands dependent for water upon appropriations made in the name of the United States, the Tri-State appropriations are fixed and adjudicated at 63,000 acres or 900 c. f. s. by the decree in the case of *United States* v. *Tilley*, Nebraska, Exhibit 593, affirmed in 124 Fed. (2d) 850, and such provisions of the Master's report are contrary to the evidence, not sustained by sufficient evidence and contrary to law.

31. Complainant excepts to paragraph numbered 3 (b), page 178, for the reason that it makes no allowance for Nebraska appropriators to take water which might otherwise run to waste without charge against their respective allotments; such a provision being necessary for the proper and economical adininistration of the river, and being commonly included in Warren Act contracts listed in the footnote, page 189.

32. Complainant excepts to paragraph numbered 6, on page 179, for the reason that the findings and conclusions contained therein are contrary to the evidence, not sustained by sufficient evidence, contrary to law and unjust and inequitable in that the waters in the Whalen-Tri-State Dam section are to be distributed in an unjust and inequitably large proportion to Wyoming, and that a strict interstate priority administration for such area would be more just and equitable or a "block" or "group" system, as described on page 159, as applied to table 17, pages 86 to 87, would be more just and equitable.

33. Complainant excepts generally to said report for the reason that it fails to apportion the natural flow in

the section below Guernsey Reservoir outlet by an apportionment of the natural flow available below said point and down to and including Bridgeport, Nebraska, on a priority schedule for the reason that such priority schedule is the only fair just and equitable apportionment and the only apportionment consistent with precedents and previous decisions of this court.

34. Complainant excepts generally to said report for the reason that if regulation below the Guernsey Reservoir outlet is to be limited in its benefits to those canals diverting at the Tri-State Dam and a priority schedule should be rejected, a more fair, just and equitable apportionment would be to give to Wyoming and Nebraska allotments of waters depending upon the flow in blocks or groups in accordance with table XVII, pages 86 and 87 of said report, modified to allow for a proper demand on behalf of the Tri-State Canal.

Respectfully submitted,

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